LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 18 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1964

No. 928

D. GORDON RUPE and SYLVAN LANG, Individually and as Trustees under a Trust Agreement Dated August 31, 1937, and SAN ANTONIO CORPORATION, a Delaware Corporation,

Petitioners,

VS.

HELEN G. WALLACE, PAULINE HIRSCHBERG, NORMAN ASHER, DAVID HORWICH, MINNIE G. HORWICH and ARNOLD I. SHURE,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District

BRIEF IN OPPOSITION

ROBERT A. SPRECHER,
111 W. Monroe Street,
Chicago, Illinois 60603,
Attorney for Respondents.

CROWLEY, SPRECHER, BARRETT & KARABA,
Of Counsel.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

INDEX.

PAGE

Statement 1

Reasons for Denying the Writ 5

Conclusion 15

CITATIONS

Cases:

Hanson v. Denckla, 357 U.S. 235 (1958 7

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 11

McGee v. International Life Ins. Co., 335 U.S. 220 (1957) 14

Montgomery Ward & Co. v. United Retail Employees, 400 Ill. 38 (1948) 13

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 6

Nelson v. Miller, 11 Ill. 2d 378, 143 N.E. 2d 673 (1957) 5, 13

Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) 14

Smyth v. Twin State Improvement Corporation, 116 Vt. 569, 80 A. 2d 664 (1951) 13

Miscellaneous:

Annotation, 25 A.L.R. 2d, 1202 13

Cleary and Seder, "Extended Jurisdictional Bases for Illinois Courts," 50 N.W. Law Rev. 599 (1955) 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1964

No. 928

D. GORDON RUPE and SYLVAN LANG, Individually and as Trustees under a Trust Agreement Dated August 31, 1937, and SAN ANTONIO CORPORATION, a Delaware Corporation,

Petitioners,

vs.

HELEN G. WALLACE, PAULINE HIRSCHBERG, NORMAN ASHER, DAVID HORWICH, MINNIE G. HORWICH and ARNOLD I. SHURE,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District

BRIEF IN OPPOSITION

STATEMENT.

The respondents respectfully request that the petition for a writ of certiorari filed by the petitioners in this Court on February 23, 1965, be denied.

The petitioners seriously misstate the question presented by them for review. They state that "the only contact" of San Antonio Corporation and of the trustees of the voting trust was "the appointment of Chicago Title and Trust Company" as their "transfer agent and registrar." This is utterly untrue.

The entire relation existing between the petitioners on one hand and the respondents on the other was created by the trust agreement of August 31, 1937. This tri-partite agreement constituted the contract between and among (1) San Antonio Corporation (then called "Smith Young Tower Corporation"), (2) the trustees under the agreement, and (3) "the holders from time to time of participation certificates issued and to be issued thereunder" (Record, p. 56).

The trust agreement provides that "Chicago Title and Trust Company, Chicago, Illinois, is hereby constituted and appointed *the agent* of the Trustees * * *" (Record, p. 65). Throughout the agreement, Chicago Title is called "the agent" (Record, pp. 65-7). Article III, Section 3 of the Trust Agreement reads in part as follows (Record, p. 66):

> "In case of the resignation or removal of the Agent, or in case the Agent shall be dissolved or otherwise become disqualified from acting, *a corporate successor, with its principal place of business at Chicago, Illinois, shall be appointed by the Trustees* and notice of such appointment shall be given by them forthwith to the Corporation. Upon the designation of any successor Agent, *all certificates of stock and other property held by the Agent* so resigned or removed *shall forthwith*, upon written instruction of the Trustees, *be delivered to the new Agent designated as aforesaid*, and upon so doing the Agent so resigned or removed shall be free from all liability whatsoever for the future disposition or custody of such stock or property." (Emphasis supplied).

The voting trust agreement not only constituted and appointed The Chicago Title and Trust Company *as agent* for the trust but expressly provided that any successor agent must have its principal place of business in Chicago, Illinois. All the parties to the trust agreement *contracted* that the trust corpus *remain* in Illinois. Having caused numerous Chicago and Illinois investors to invest in the trust in reliance upon the reputation and stability of the Chicago Title and Trust Company and having traded upon that fact (Record, pp. 38-9), the petitioners cannot now escape their obligations in Illinois by their own subsequent acts which the complaint alleges to be wrongful.

This is a radically different situation than the one portrayed by the petitioners wherein they would mislead this Court into believing that the corporation and the trustees merely and casually appointed the Chicago Title and Trust as transfer agent and registrar. Actually, the corporation and the trustees had in 1937 *contracted* with the respondents that the Chicago Title and Trust be appointed *as agent* for the trustees The Chicago Title and Trust Company and further provided that any successor agent must have its principal place of business at Chicago, Illinois.

The Appellate Court correctly stated (Opinion, page 9a):

> "*The defendants have employed an agent in this State for many years* and to that extent they have been protected by our laws. Defendants have received adequate notice of the litigation. The basic requirements of fairness under the due process clause have been met." (Emphasis supplied).

Thus the language of Section 17 of the Illinois Civil Practice Act (Ill. Rev. Stats., 1963, c. 110, §17) is particularly applicable:

> "Any person, whether or not a citizen or resident of this State, who in person or *through an agent* does *any of the acts hereinafter enumerated, thereby submits said person* * * * *to the jurisdiction of the courts* of this State * * *"

The correct question presented is:

> "Whether it is a violation of the due process clause of the Fourteenth Amendment to apply Section 17 of the Illinois Civil Practice Act to nonresidents of Illinois who have been transacting business in the State of Illinois for many years through an agent."

REASONS FOR DENYING THE WRIT.

In brief, the complaint herein seeks redress for breaches of a 1937 voting trust agreement which was completed in the State of Illinois by the acceptance of the Chicago Title and Trust Company (Record, p. 83), which agreement was purportedly extended in 1947 and 1957 by agreements similarly executed in Illinois, and which related to a *trust corpus which has been within the State of Illinois from 1937 to this date and has been held in Illinois by the Chicago Title and Trust Company since 1937*. The entire corpus of this voting trust is the shares of stock in San Antonio Corporation held in the names of the voting trustees. The Chicago Title and Trust Company has held in Chicago, Illinois, continuously from 1937 to the present "such certificates for shares of stock of San Antonio Corporation" (Record, p. 24), which constituted all of the shares in trust. Thus the trust fund, the trust res, the trust corpus and the trust assets are situated in the State of Illinois.

The Supreme Court of Illinois has interpreted Section 17 to be co-extensive with due process. In *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N.E. 2d 673 (1957), the Illinois Supreme Court said at pages 389 (679):

> "Sections 16 and 17 of the Civil Practice Act reflect a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause."

An analysis of the jurisdictional cases decided by the Supreme Court of the United States demonstrates completely that the Appellate Court in the present case correctly determined that it had jurisdiction under Section 17.

In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Central Hanover Bank & Trust Company filed a petition in a New York court for the settlement of its accounts as trustee of a common trust fund established under the New York Banking Law. In the course of the proceedings, questions arose as to the type of notice required to be given to non-resident beneficiaries of the trust. At the outset, this Court held that since *the trust fund* existed in New York, the New York courts had jurisdiction over the trust. The Court then considered the impact of the Fourteenth Amendment, stating at page 314:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections."

The Court then held that constructive notice by publication was sufficient to bind those beneficiaries whose whereabouts were not known, but that as to the known beneficiaries, some notice other than publication would be necessary, the Court stating at pages 318-319:

> "The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, *at least by ordinary mail to the record addresses* * * * Certainly sending them a copy of the statute months and perhaps years in advance does not answer this purpose. The trustee periodically remits their income to them, and we think that they might reasonably expect that with or apart from their remittances word might come to them personally that steps were being taken affecting their interests.
>
> * * * * *

> "* * * *Of course personal service even without jurisdiction of the issuing authority serves the end of actual and personal notice, whatever power of compulsion it might lack.* However, no such service is required under the circumstances. This type of trust presupposes a large number of small interests. This individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable. * * *" (Emphasis supplied).

In the present case, the trust fund was situated in the State of Illinois and no part of the trust assets were in any other state. Furthermore, the Chicago Title and Trust Company and D. Gordon Rupe were served personally and not by publication.

The case relied upon most heavily by the petitioners in their petition is *Hanson* v. *Denckla*, 357 U.S. 235 (1958). That case supports the jurisdiction of the Illinois Court in a case such as the present one, where the trust res is located within the State of Illinois. In that case, a grantor who died as a resident of Florida had executed a trust agreement in Delaware in 1935, naming the Wilmington Trust Company of Wilmington, Delaware, as trustee. Legatees under the grantor's will brought an action in Florida to construe the grantor's will as well as the 1935 trust. Many beneficiaries of the 1935 agreement and legates under the will were not residents of Florida and an at-

tempt was made to serve all non-residents by publication and by notice by ordinary mail as required by Florida statutes dealing with constructive service. When the case came to the Supreme Court of the United States, the Florida Supreme Court had upheld the jurisdiction of Florida over the issues, including the validity of the 1935 trust agreement, and the Supreme Court of Delaware in another case had held that Delaware courts had jurisdiction over the trust. The Supreme Court of the United States reversed the Florida decision, holding that Florida did not obtain jurisdiction over the non-resident parties, but affirmed the Delaware decree, where the trust fund was located and where the trustee, The Wilmington Trust Company, was also located. In the present case, the trust fund is located in the State of Illinois and the Chicago Title and Trust Company was the agent for the trustees, standing in the same position as The Wilmington Trust Company in the *Hanson* v. *Denckla* case. Furthermore, in the present case, both the Chicago Title and Trust Company and D. Gordon Rupe were served personally and not by publication as was attempted in *Hanson* v. *Denckla*.

Every issue raised by the complaint arises out of the trust agreement and its breach. The defendant, San Antonio Corporation, is a party to the trust agreement. The complaint alleges that the corporate defendant is completely controlled by the individual defendants, that Rupe and Lang were directors of the corporation, that their attorney was also a director, that Rupe is president of the corporation, Lang is vice president, and their attorney is secretary, and that Rupe and Lang have used their position as trustees under the voting trust to retain and perpetuate complete control of the trust and complete voting control of the corporate defendant (Record, pp. 6-7).

The petitioner Rupe's own affidavit sets forth the "continuous business contacts" (Opinion, page 7a) and continuous trust operations carried on in the State of Illinois.

Rupe testified in his affidavit that on *August 31, 1937*, the written voting trust agreement entered into by the corporation and the holders of participation certificates issued under the agreement "specifically designated Chicago Title and Trust Company *as agent* of the voting trust" (Record, p. 23). This designation continued under the purported voting trust extension of 1947 and 1957 "without amendment or modification" (Record, p. 23). Thus under the documents of 1937, 1947 and 1957, the Chicago Title and Trust Company of the City of Chicago, Illinois was authorized *continuously* from August 31, 1937 to the present time, according to Rupe's own testimony (Record, pp. 23-4):

> "(a) To execute and issue participation certificates on behalf of the Trustees.
>
> "(b) To deliver such participation certificates in accordance with the instructions of the Trustees.
>
> "(c) Thereafter from time to time to transfer such participation certificates on books kept for that purpose upon the surrender properly endorsed for such transfer of said certificates.
>
> "(d) To deliver to those entitled thereto any participation certificates issued in lieu of certificates so surrendered.
>
> "(e) *To hold as depositary for the Trustees, such certificates for shares of stock of San Antonio Corporation* and/or other stock certificates or other property as may be delivered to it for that purpose by the Trustees.
>
> "(f) To do such other things as the Trustees may from time to time prescribe." (Emphasis supplied)

The "assets" of the voting trust are the shares of stock in San Antonio Corporation held in the names of the voting trustees. The Chicago Title and Trust Company has held in Chicago, Illinois, continuously from 1937 to the present "as depositary for the Trustees, such certificates for shares of stock of San Antonio Corporation" (Record, p. 24), which constituted all of the shares in trust. Rupe further testified in his affidavit that the Chicago Title and Trust Company performed the following acts for the trust (Record, pp. 24-5):

> "(a) The execution and issuance of participation certificates;
>
> "(b) The delivery of such participation certificates when instructed so to do by the Trustees;
>
> "(c) The maintenance of current lists of participation certificate holders;
>
> "(d) The mailing of notices by the Voting Trustees to said participation certificate holders whenever instructed so to do by the Trustees (said notices and other mailings being prepared and printed in the State of Texas and forwarded to Chicago Title and Trust Company for mailing purposes only);
>
> "(e) The exchange of participation certificates for shares of stock of San Antonio Corporation; and
>
> "(f) The mailing of dividends to participation certificate holders upon receipt thereof from San Antonio Corporation in Texas."

The plaintiff testified as follows in his affidavit (Record, pp. 38-9):

> "For many years prior to 1955, affiant had been aware of the splendid reputation of Chicago Title and Trust Company as an institution of great financial stability, and consequently affiant was motivated in large part in making his investment in the corporate stock and voting trust certificates of the corporation

by the said relationship between the corporation and Chicago Title and Trust Company.

"Affiant is informed and believes that the original financing for the erection of the building in San Antonio, owned by San Antonio Corporation, which was originally known as Smith Young Tower Corporation, was largely obtained through investors in the area of the City of Chicago and the business contacts between said San Antonio Corporation and Chicago Title and Trust Company were established and publicized for the purpose, among others, of attracting investment capital from Chicago to the project."

In addition to its relation to the voting trust, the Chicago Title and Trust Company acted continuously from August, 1947 to date as the transfer agent and registrar for the defendant corporation (Record, pp. 17-20). Copies of the corporation's charter, by-laws, specimen stock certificates and a legal opinion as to the validity of the corporation's organization and issuance of stock, were delivered to the Chicago Title and Trust Company in Chicago (Record, p. 20).

Finally, the contract consisting of the 1937 voting trust agreement was completed in Illinois where it was "accepted" by the Chicago Title and Trust Company (Record, 83), and the purported agreements of 1947 and 1957 were completed in Illinois by similar acceptance (Record, pp. 92, 100). In each of the three documents, the last act performed in regard thereto was the acceptance in Illinois.

In *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), it was held that personal service outside the jurisdiction could result in a personal judgment if "certain minimum contacts" within the territory of the forum were shown so that the maintenance of the suit does not "offend traditional notions of fair play and substantial jus-

tice." In the case of a foreign corporation, this Court held that the demands of due process "may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." Contrary to the petitioners' argument in the present case (petition, pages 15-18), the Supreme Court also stated:

> "There have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to *justify suit against it on causes of actions arising from dealings entirely distinct from those activities.*" (Emphasis supplied)

In the language of the *International Shoe* case, it is "reasonable * * * to require" the petitioners to defend this suit in Illinois. The sale of corporate assets may have occurred outside of Illinois, but as the Supreme Court of the United States said in the *International Shoe* case, a cause of action may arise "from dealings entirely distinct from those activities" carried on within the State. Furthermore, the facet of the cause of action to the effect that the proceeds of the sale of assets should not have been reinvested, but should have been distributed to the certificate holders was based upon Article IX of the voting trust agreement (Record, pp. 78-9), which was an Illinois contract.

Paragraph 9 of the Complaint herein alleged (Record, pp. 6-7):

> "The individual Defendants have entered into an agreement and combination whereby they have used their position as Trustees under said voting trust to retain and perpetuate complete control of the trust and through the trust complete voting control of the Corporation."

The Commission of a single tort within a state has been held to be sufficient minimum contact. In *Smyth* v. *Twin State Improvement Corporation*, 116 Vt. 569, 80 A. 2d 664 (1951), the court held that the commission of a single tort exposed a foreign corporation to jurisdiction even though it was not doing business within the state. See also, Annotation, 25 A.L.R. 2d 1202. In *Nelson* v. *Miller*, *supra*, the Illinois Supreme Court, in discussing the *Smyth* case, said at page 679:

> "Jurisdiction [in that case], as here, was based upon the commission of a single tort within the State."

Section 17 provides that "the commission of a tortious act within this state" confers jurisdiction.

In the present case, the petitioners are also charged with the tort of conspiracy to induce a breach of the voting trust.

In Cleary and Seder, "Extended Jurisdictional Bases for Illinois Courts," 50 Nw. Law Rev. 599 (1955), the authors stated at pages 609-610, under the heading "Commission of a Tort as a Basis for Jurisdiction":

> "In this area, the question of jurisdiction under the revised Act does not depend upon nice distinctions as to where the cause of action arose since * * * the cause of action itself need not have arisen in Illinois if it involves business transaction or torts committed within the state. Rather, the question of whether a tort was committed within this state, within the meaning of the revised Act, should depend upon whether, under the circumstances of its commission, it is reasonable to require the defendant to stand trial in Illinois."

In *Montgomery Ward & Co.* v. *United Retail Employees*, 400 Ill. 38 (1948), the Illinois Supreme Court said at page 53:

"The gist of the civil conspiracy is damage, not the combination."

The facts in *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), are similar to the facts in this case: in both cases an office was maintained in the forum state, records were kept there, checks were distributed from there, the transfer agent was there, and a continuous and systematic operation was carried on there. This Court held in the *Perkins* case that due process permitted the forum state to exercise its jurisdiction over a nonresident corporation.

In *McGee* v. *International Life Ins. Co.*, 335 U.S. 220 (1957), a Texas corporation which had never done business in California, mailed a reinsurance contract from Texas to California, where it was signed and returned by mail to Texas. Premium payments were mailed from California. Though the Texas corporation had no other contacts or contracts in California, this Court held that the single contract was sufficient to support the jurisdiction of the California court.

The manifold contacts in the present case amply support the Appellate Court's decision holding that Illinois may exercise jurisdiction. Particularly significant is the fact that Chicago investors invested their money in Illinois, the certificates were issued by their Illinois agent and the voting trust has been administered continuously in Illinois. When the terms of the voting trust required that the funds be repaid to the Chicago investors, the trust was ignored and the Chicago-originated funds were reinvested in an entirely different kind of business in Texas, contrary to the trust agreement. Under these circumstances, the Illinois investors should not be forced to seek redress in Texas and due process does not require them to do so.

CONCLUSION.

For the foregoing reasons, the respondents respectfully urge that the petition for a writ of certiorari be denied.

Respectfully submitted,

ROBERT A. SPRECHER,
111 W. Monroe Street,
Chicago, Illinois 60603,
Attorney for Respondents.

CROWLEY, SPRECHER, BARRETT & KARABA,
Of Counsel.